

1516137 (Migration) [2016] AATA 4473 (4 October 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Yan Liu

CASE NUMBER: 1516137

DIBP REFERENCE(S): OSF2013/023846

MEMBER: Suzanne Carlton

DATE: 4 October 2016

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa:

- cl.100.221 of Schedule 2 to the Regulations
-

Statement made on 04 October 2016 at 11:19am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 November 2015 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 2 April 2013 on the basis of her relationship with her sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter, the primary criteria include cl.100.221.
4. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221 because the applicant had failed to provide evidence of her genuine and ongoing relationship by the date provided.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant continues to be in an ongoing and genuine spousal relationship with her sponsoring partner.
7. **SPOUSE/DE FACTO (cl.100.221(2)(b), (2A)(b))**
8. **Whether the parties are in a spouse or de facto relationship**
9. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, amongst other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Evidence is before the Tribunal that the parties registered their marriage in China on 28 December 2012. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of assets, and joint liabilities; the extent of any pooling of financial resources, any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
13. The parties have a joint bank account, as well as individual bank account. The evidence provided indicates that the sponsor manages the finances for the couple and supports the applicant. The applicant has no income and is maintaining the home.
14. The Tribunal has had regard to the evidence provided relating to the nature of the parties' household, including any joint responsibility for the care and support of children, the parties' living arrangements; and any sharing of housework.
15. The parties have provided evidence of shared residential premises. The parties have provided declaratory evidence relating to how they share household duties.
16. The Tribunal has had regard to the evidence provided relating to the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
17. The parties have provided declaratory evidence from friends, neighbours and a relative of social recognition. They have undertaken joint travel and provided evidence of this.
18. The Tribunal has had regard to the evidence provided relating to the nature of persons' commitment to each other, including the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
19. Based on the evidence before it, the Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of others and that they are in a genuine and continuing relationship. They live together and each appears to see the relationship as long-term.
20. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship.
21. Therefore the applicant meets cl.100.221(2).
22. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 100 visa.

DECISION

23. The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa:
- cl.100.221 of Schedule 2 to the Regulations

Suzanne Carlton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).